

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 31, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES C.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,²

Defendant.

No. 4:20-CV-5079-EFS

**ORDER DENYING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION
AND GRANTING DEFENDANT'S
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions.³

Plaintiff James C. appeals the denial of benefits by the Administrative Law Judge

¹ To protect the privacy of the social-security Plaintiff, the Court refers to him by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

² On July 9, 2021, Ms. Kijakazi became the Acting Commissioner of Social Security. She is therefore substituted for Andrew Saul as Defendant. Fed. R. Civ. P. 25(d); 42 U.S.C. § 405(g).

³ ECF Nos. 14 & 17.

(ALJ). He alleges the ALJ erred by 1) improperly considering certain medical opinions, 2) improperly discounting his symptom reports, and 3) improperly determining step five of the sequential disability evaluation based on an incomplete hypothetical question. In contrast, Defendant Commissioner of Social Security asks the Court to affirm the ALJ's decision finding Plaintiff is not disabled. After reviewing the record and relevant authority, the Court denies Plaintiff's Motion for Summary Judgment, ECF No. 14, and grants the Commissioner's Motion for Summary Judgment, ECF No. 17.

I. Five-Step Disability Determination

A five-step sequential evaluation process is used to determine whether an adult claimant is disabled.⁴ Step one assesses whether the claimant is currently engaged in substantial gainful activity.⁵ If the claimant is engaged in substantial gainful activity, benefits are denied.⁶ If not, the disability evaluation proceeds to step two.⁷

Step two assesses whether the claimant has a medically severe impairment, or combination of impairments, which significantly limits the claimant's physical

⁴ 20 C.F.R. § 416.920(a).

⁵ *Id.* § 416.920(a)(4)(i).

⁶ *Id.* § 416.920(b).

⁷ *Id.* § 416.920(b).

1 or mental ability to do basic work activities.⁸ If the claimant does not, benefits are
2 denied.⁹ If the claimant does, the disability evaluation proceeds to step three.¹⁰

3 Step three compares the claimant's impairment or impairments to several
4 recognized by the Commissioner as so severe as to preclude substantial gainful
5 activity.¹¹ If an impairment or combination of impairments meets or equals one of
6 the listed impairments, the claimant is conclusively presumed to be disabled.¹² If
7 not, the disability evaluation proceeds to step four.

8 Step four assesses whether an impairment or impairments prevents the
9 claimant from performing work he performed in the past by determining the
10 claimant's residual functional capacity (RFC).¹³ If the claimant can perform prior
11 work, benefits are denied.¹⁴ If the claimant cannot perform prior work, the
12 disability evaluation proceeds to step five.

13 Step five, the final step, assesses whether the claimant can perform other
14 substantial gainful work—work that exists in significant numbers in the national
15

16 ⁸ 20 C.F.R. § 416.920(a)(4)(ii).

17 ⁹ *Id.* § 416.920(c).

18 ¹⁰ *Id.*

19 ¹¹ *Id.* § 416.920(a)(4)(iii).

20 ¹² *Id.* § 416.920(d).

21 ¹³ *Id.* § 416.920(a)(4)(iv).

22 ¹⁴ *Id.*

economy—considering the claimant’s RFC, age, education, and work experience.¹⁵

If so, benefits are denied. If not, benefits are granted.¹⁶

The claimant has the initial burden of establishing he is entitled to disability benefits under steps one through four.¹⁷ At step five, the burden shifts to the Commissioner to show the claimant is not entitled to benefits.¹⁸

II. Factual and Procedural Summary

Plaintiff filed a Title XVI application, at first alleging a disability onset date of January 15, 2011.¹⁹ His claim was denied initially and upon reconsideration.²⁰ An administrative hearing was held by video before Administrative Law Judge Stewart Stallings.²¹ At the video hearing, Plaintiff amended his alleged disability onset date to July 21, 2016.²²

¹⁵ 20 C.F.R. § 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

¹⁶ 20 C.F.R. § 416.920(g).

¹⁷ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

¹⁸ *Id.*

¹⁹ AR 221-237.

²⁰ AR 146-150, 154-57.

²¹ AR 44-87.

²² AR 48. Plaintiff filed a prior Title XVI application in 2011 that was denied by an unfavorable decision dated September 11, 2014. That decision was affirmed by the

1 In denying Plaintiff's disability claim, the ALJ made the following findings:

- 2 • Step one: Plaintiff had not engaged in substantial gainful activity
3 since July 21, 2016, the application date and amended alleged onset
4 date.
- 5 • Step two: Plaintiff had the following medically determinable severe
6 impairments: bilateral knee degenerative joint disease, status post
7 surgeries to both knees; lumbar spondylarthrititis; a depressive
8 disorder; a bipolar disorder; and an anxiety disorder with panic and
9 social phobia.
- 10 • Step three: Plaintiff did not have an impairment or combination of
11 impairments that met or medically equaled the severity of one of the
12 listed impairments.
- 13 • RFC: Plaintiff had the RFC to:

15 Appeals Council on May 17, 2016. The ALJ in this case found the presumption of
16 continuing nondisability applicable to subsequent disability claims was rebutted
17 because changed circumstances affected the issue of disability, including
18 allegations of the existence of bipolar disorder that were not previously considered.
19 AR 25. The Listing of Impairments was also revised since the prior unfavorable
20 decision. AR 25. The ALJ also found new and material evidence meant he was not
21 required to give effect to certain findings contained in the previous unfavorable
22 ALJ decision. AR 25-26.

perform a limited range of sedentary work as defined in 20 CFR 416.967(a). Specifically, the claimant can lift up to 10 pounds occasionally, stand or walk for about two hours, and sit for up to eight hours per eight-hour workday with normal breaks. The claimant cannot engage in foot control operations or climb ladders, ropes, or scaffolds, but can occasionally climb ramps and stairs and stoop. However, he can only rarely (defined as no more than 15 percent of the time) crouch, and cannot kneel or crawl. The claimant needs to avoid all use of moving or dangerous machinery and exposure to unprotected heights. The claimant also needs simple, routine work (although not necessarily unskilled work) in a low-stress job, meaning that he cannot engage in production pace work in which the pace of work is not worker-controlled. For example, he cannot do assembly-line work or work with sales quotas. In addition, the claimant can have no more than brief and superficial in-person interaction with the public and coworkers, and can have only occasional interaction with supervisors.

- Step four: Plaintiff has no past relevant work.
- Step five: considering Plaintiff's RFC, age, education, and work history, Plaintiff could perform work that existed in significant numbers in the national economy, such as call-out operator, circulation clerk, and typist.²³

When assessing the medical-opinion evidence, the ALJ gave:

- great weight to the treating opinion of Deborah M. Rogers, ARNP, and the reviewing opinion of Donna M. Veraldi, Ph.D.
- partial weight to the examining opinion of Philip G. Barnard, Ph.D.

²³ AR 37-38.

- little weight to the reviewing opinions of Joshua J. Boyd, Psy.D., Vincent Gollogly, Ph.D., Louis Martin, M.D., and J.D. Fitterer, M.D.²⁴

The ALJ also found Plaintiff's medically determinable impairments could reasonably be expected to cause some of his alleged symptoms, but his statements concerning the intensity, persistence, and limiting effects of those symptoms were not entirely consistent with the medical evidence and other evidence in the record.²⁵

Plaintiff requested review of the ALJ's decision by the Appeals Council, which denied review.²⁶ Plaintiff timely appealed to this Court.

III. Standard of Review

A district court's review of the Commissioner's final decision is limited.²⁷ The Commissioner's decision is set aside "only if it is not supported by substantial evidence or is based on legal error."²⁸ Substantial evidence is "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁹ Moreover, because it is

²⁴ AR 30-36.

²⁵ AR 30-34.

²⁶ AR 1-6.

²⁷ 42 U.S.C. § 405(g).

²⁸ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

²⁹ *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

1 the role of the ALJ and not the Court to weigh conflicting evidence, the Court
 2 upholds the ALJ's findings "if they are supported by inferences reasonably drawn
 3 from the record."³⁰ The Court considers the entire record.³¹

4 Further, the Court may not reverse an ALJ decision due to a harmless
 5 error.³² An error is harmless "where it is inconsequential to the [ALJ's] ultimate
 6 nondisability determination."³³ The party appealing the ALJ's decision generally
 7 bears the burden of establishing harm.³⁴

8 IV. Analysis

9 A. Medical Opinions: Plaintiff fails to establish error.

10 Plaintiff challenges the ALJ's assignment of little weight to the opinion of
 11 Phillip Barnard, Ph.D. Plaintiff further challenges the ALJ's consideration of the
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13 ³⁰ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

14 ³¹ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must
 15 consider the entire record as a whole, weighing both the evidence that supports and
 16 the evidence that detracts from the Commissioner's conclusion," not simply the
 17 evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383,
 18 386 (8th Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that
 19 such evidence was not considered[.]").

20 ³² *Molina*, 674 F.3d at 1111.

21 ³³ *Id.* at 1115 (cleaned up).

22 ³⁴ *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).
 23

1 testimony provided by Donna Veraldi, Ph.D. As discussed below, Plaintiff fails to
2 establish the ALJ erred in weighing the medical-opinion evidence.

3 1. Standard for Claims filed Before March 27, 2017

4 The weighing of medical opinions depends on the nature of the medical
5 relationship, i.e., whether the medical provider is 1) a treating physician, 2) an
6 examining physician who examined but did not treat the claimant, or 3) a
7 reviewing physician who neither treated nor examined the claimant.³⁵ Generally,
8 more weight is given to the opinion of a treating physician than to an examining
9 physician's opinion, and the opinions of both treating and examining physicians are
10 given more weight than the opinion of a reviewing physician.³⁶

11 When a treating physician's or examining physician's opinion is not
12 contradicted by another physician, it may be rejected only for "clear and
13 convincing" reasons and, when it is contradicted, it may be rejected for "specific
14 and legitimate reasons" supported by substantial evidence.³⁷ A reviewing
15 physician's opinion may be rejected for specific and legitimate reasons supported by
16 substantial evidence, and the opinion of an "other" medical source³⁸ may be

18 ³⁵ *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

19 ³⁶ *Id.*; *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

20 ³⁷ *Lester*, 81 F.3d at 830.

21 ³⁸ *See* 20 C.F.R. §§ 416.902, 416.913(a) (2011) (defining acceptable medical sources
22 for claims filed before March 27, 2017).

1 rejected for specific and germane reasons supported by substantial evidence.³⁹ The
 2 opinion of a reviewing physician serves as substantial evidence if it is supported by
 3 other independent evidence in the record.⁴⁰

4 2. Dr. Barnard

5 On May 4, 2016, Dr. Barnard performed a psychological evaluation of
 6 Plaintiff.⁴¹ Dr. Barnard diagnosed Plaintiff with dysthymic disorder, post-
 7 traumatic stress disorder (PTSD), and undifferentiated somatoform disorder.⁴²
 8 Dr. Barnard opined that Plaintiff's pain would affect his ability to work to a severe
 9 extent, Plaintiff's depression would affect his ability to work to a moderate extent,
 10 and Plaintiff's anxiety would affect his ability to work to a mild extent.⁴³ As for
 11 basic work activities, Dr. Barnard opined Plaintiff had:

- 12 • "moderate" limitations in the following areas: understand, remember,
 13 and persist in tasks by following very short and simple instructions;
 14 learn new tasks; perform routine tasks without special supervision;
 15 adapt to changes in a routine work setting; make simple work-related

17 ³⁹ *Molina*, 674 F.3d at 1111; *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

18 ⁴⁰ *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

19 ⁴¹ AR 371-76. The ALJ mistakenly stated the evaluation took place in April 2016.

20 *See* AR 34.

21 ⁴² AR 373.

22 ⁴³ AR 372.

1 decisions; be aware of normal hazards and take appropriate
2 precautions; ask simple questions or request assistance; and set
3 realistic goals and plan independently.⁴⁴

- 4 • a “marked” limitation in his ability to understand, remember, and
5 persist in tasks by following detailed instructions.⁴⁵
- 6 • “severe” limitations in the following areas: perform activities within a
7 schedule, maintain regular attendance, and be punctual within
8 customary tolerances without special supervision; communicate and
9 perform effectively in a work setting; maintain appropriate behavior
10 in a work setting; and complete a normal workday and work week
11 without interruptions from psychologically based symptoms.⁴⁶

12 The ALJ stated that he gave “partial weight” to Dr. Barnard’s opinion. In
13 particular, the ALJ gave great weight to Dr. Barnard’s opinion regarding the basic
14 work activities for which Plaintiff had moderate limitations but gave little weight
15 to Dr. Barnard’s opinion as to the basic work activities for which Plaintiff had
16 marked or severe limitations.⁴⁷ The ALJ said the weight given to these different
17 parts of Dr. Barnard’s opinion is consistent with the fact that Plaintiff engaged in
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19 ⁴⁴ AR 373-74.

20 ⁴⁵ AR 374.

21 ⁴⁶ AR 373-374.

22 ⁴⁷ AR 35.

1 numerous activities of daily living. The ALJ also said the weight given to the
2 different parts of Dr. Barnard's opinion was consistent with Dr. Barnard's largely
3 unremarkable contemporaneous objective findings at the time of the evaluation.
4 The ALJ concluded the "more functionally limiting aspects of Dr. Barnard's opinion
5 appear inconsistent with the results of his psychological evaluation."⁴⁸

6 Dr. Barnard's examining opinion is contradicted by Dr. Veraldi's reviewing
7 opinion, which is supported by independent evidence.⁴⁹ For that reason, the ALJ
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9 ⁴⁸ AR 35.

10 ⁴⁹ When explaining her view of the paragraph B criteria as applied to Plaintiff,
11 Dr. Veraldi assessed only a mild limitation in the ability to understand, remember,
12 and apply information. AR 63. Dr. Veraldi also assessed a moderate limitation in
13 social functioning as there was no evidence that Plaintiff acted on the anger and
14 irritability he noted. AR 64-65. Dr. Veraldi also assessed only a moderate
15 limitation in the ability to concentrate, persist, and maintain pace. AR 65-66.
16 Dr. Veraldi also said Plaintiff was only moderately limited in his ability to adapt
17 and manage himself. AR 66-67. Independent evidence supporting these findings
18 includes but is not limited to the following: Plaintiff completed some college
19 coursework, Plaintiff completed mental health court (a rigorous and stressful
20 experience for him), Plaintiff has recognized when his mental health symptoms are
21 worsening and sought appropriate help, and Plaintiff had largely unremarkable
22 mental status exams in 2017. *See* AR 606, 646.

1 may reject it for “specific and legitimate reasons” supported by substantial
2 evidence.⁵⁰

3 One reason the ALJ discounted Dr. Barnard’s opinion—rendered after a
4 single evaluation of Plaintiff—was because it was inconsistent with Dr. Barnard’s
5 own largely unremarkable contemporaneous objective findings. Plaintiff argues
6 that “unremarkable” objective findings are not a proper basis upon which to reject
7 the opinion because psychological symptoms rarely have objective findings and, in
8 any case, there are repeated objective findings in Plaintiff’s case.⁵¹ Plaintiff notes
9 that the ALJ himself “acknowledge[d] findings of depressed mood, blunted affect,
10 poor or intermittent eye contact, irritability, being uncooperative, sad/anxious
11 appearance, and psychomotor retardation.”⁵² But the ALJ did not find that
12 Plaintiff had *no* objective findings of psychological symptoms; rather, he found that
13 Plaintiff had largely unremarkable *contemporaneous* objective findings *at the time*
14 *of Dr. Barnard’s evaluation*.⁵³ In other words, the ALJ concluded Dr. Barnard’s
15 opinion was inconsistent with the results of his own evaluation—the only
16 evaluation of Plaintiff that Dr. Barnard completed.

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19 ⁵⁰ *Lester*, 81 F.3d at 830.

20 ⁵¹ ECF No. 14 at 9.

21 ⁵² ECF No. 14 at 9.

22 ⁵³ AR 35.

1 A psychologists' opinion may be based on clinical interviews and mental
2 status exams in combination with a claimant's self-reports.⁵⁴ However, an ALJ may
3 discount an opinion that is inadequately supported by medical findings and
4 observations.⁵⁵ Moreover, "[a] physician's opinion can be discredited based on
5 contradictions between the opinion and the physician's own notes."⁵⁶ Here,
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7 ⁵⁴ *Buck v. Berryhill*, 869 F.3d 1040, 1045 (9th Cir. 2017) (psychologist's opinion was
8 based on a clinical interview and mental status evaluation and partially relied on
9 the claimant's self-reports; partial reliance on self-reported symptoms was not a
10 valid reason to reject the opinion).

11 ⁵⁵ *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)
12 (recognizing that a medical opinion may be rejected if it is conclusory or
13 inadequately supported); *Lingenfelter*, 504 F.3d at 1042 (recognizing that a medical
14 opinion is evaluated as to the amount of relevant evidence that supports the
15 opinion, the quality of the explanation provided in the opinion, and the consistency
16 of the medical opinion with the record as a whole); *Crane v. Shalala*, 76 F.3d 251,
17 253 (9th Cir. 1996).

18 ⁵⁶ *Id.* at 1050; *see also Baker v. Saul*, 836 F. App'x 526, 528 (9th Cir. 2020)
19 (unpublished) (noting that the psychologist had only met with the claimant once
20 and "[t]he ALJ compared [the psychologist]'s conclusions to the doctor's own notes,
21 which indicated that Baker performed within the normal limits for six of the eight
22 "additional detail" categories on the mental status exam.").

1 Dr. Barnard assessed various “marked” and “severe” limitations despite express
2 findings from the “additional detail” categories of the mental status exam that
3 Plaintiff was within normal limits in the six out of eight categories: thought
4 process and content, orientation, perception, memory, fund of knowledge, and
5 abstract thought.⁵⁷ Dr. Barnard found Plaintiff was not within normal limits in two
6 categories: concentration and insight and judgment.⁵⁸ Even there, however, with
7 respect to concentration, while Plaintiff could not complete serial sevens,
8 Dr. Barnard noted only a “Mild range of impairment” with respect to Parts A and B
9 of Halstead’s Trail Making Test and also noted results within normal limits on the
10 TOMM.⁵⁹ With respect to insight and judgment, Dr. Barnard checked that
11 Plaintiff’s insight and judgment were not within normal limits but then provided
12 the following inconsistent notes:

13 **Mr. [REDACTED]'s insight is fair. On the judgement item of what he would do if he**
14 **smelled smoke in a crowded theater, he replied, "Find the emergency exit and help**
15 **people get out – find the source."**

16 In short, the ALJ rationally characterized the results of the mental status
17 exam as “largely unremarkable.” The inconsistency between those largely
18 unremarkable findings and the marked and severe limitations assessed by
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20 ⁵⁷ AR 375.

21 ⁵⁸ AR 375.

22 ⁵⁹ AR 375.

1 Dr. Barnard was a specific and legitimate reason supported by substantial
2 evidence to reject Dr. Barnard's opinion.

3 As for activities of daily living, an ALJ may discount a medical opinion that
4 is inconsistent with the claimant's level of activity or if claimant's activities are
5 easily transferable to the workplace environment.⁶⁰ But "many home activities are
6 not easily transferable to what may be the more grueling environment of the
7 workplace."⁶¹ Here, the ALJ did not specify the activities he relied upon as being
8 inconsistent with Dr. Barnard's opinion. The ALJ instead made a general reference
9 to activities of daily living mentioned elsewhere in the opinion. The Court is limited
10 to addressing the reasons articulated by the ALJ for discounting Dr. Barnard's
11 opinion.⁶² It is difficult for this Court to meaningfully review the ALJ's finding in
12 this regard without knowing the activities upon which the ALJ relied. Nonetheless,
13 even if the ALJ erred by discounting Dr. Barnard's opinion based on activities of
14 daily living, any error was harmless because, as explained above, the ALJ offered
15 another clear and convincing reason for rejecting Dr. Barnard's opinion—that it
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18 ⁶⁰ *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Fair v. Bowen*, 885 F.2d
19 597, 603 (9th Cir. 1989).

20 ⁶¹ *Fair*, 885 F.2d at 603.

21 ⁶² *See Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (recognizing court
22 review is constrained to the reasons the ALJ asserts).
23

1 was inconsistent with his unremarkable findings.⁶³ As explained above, after
2 performing a mental status exam, Dr. Barnard concluded Plaintiff was within
3 normal limits in six out of eight categories. Moreover, the two categories for which
4 Dr. Barnard said Plaintiff was not within normal limits contained contradictory
5 notes. The ALJ's decision to discount Dr. Barnard's opinion is supported by
6 substantial evidence, including the opinion of Dr. Veraldi, discussed below, and two
7 other mental status exams performed by Plaintiff's counseling center in 2017.⁶⁴
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11 ⁶³ See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)
12 (requiring the error to be consequential to the disability analysis).

13 ⁶⁴ AR 606 (noting the following: intermittent eye contact, normal posturing, some
14 psychomotor retardation, fluent speech at an appropriate rate with low volume,
15 goal-directed and linear thought process, no suicidal or homicidal ideation, no
16 intent or plan, no evidence of paranoia, delusions, or ideas of reference, depressed
17 mood, restricted range and mood-congruent affect, alert and awake, fully oriented,
18 fair insight/judgment), AR 646 (noting that Plaintiff was calm, cooperative polite,
19 described his mood as struggling with racing thoughts, euthymic affect, interacted
20 well, had normal body posturing with no abnormal movements, made intermittent
21 eye contact, had normal, clear, articulated speech with normal rate and volume,
22 and thought process was goal directed and logical).
23

1 3. Dr. Veraldi

2 Dr. Veraldi reviewed the medical evidence of record and testified at the video
3 hearing. Dr. Veraldi agreed that Plaintiff had depression and anxiety but did not
4 see clear signs of PTSD.⁶⁵ She also noted that the record did not reveal any
5 documentation of a manic episode, but that Plaintiff would meet the criteria of
6 bipolar disorder based on the symptoms he endorsed.⁶⁶ With respect to the
7 paragraph B criteria as applied to Plaintiff, Dr. Veraldi assessed the following:

- 8 • mild limitation in the ability to understand, remember, and apply
9 information;⁶⁷
10 • moderate limitations in the following: social functioning;⁶⁸ the ability
11 to concentrate, persist, and maintain pace;⁶⁹ and the ability to adapt
12 and manage himself.⁷⁰

13 Dr. Veraldi ultimately concluded Plaintiff should be limited to simple,
14 routine, repetitive work due to concentration issues, with limited interaction with
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17 ⁶⁵ AR 59, 63.

18 ⁶⁶ AR 59-61.

19 ⁶⁷ AR 63.

20 ⁶⁸ AR 64-65.

21 ⁶⁹ AR 65-66.

22 ⁷⁰ AR 66-67.

1 co-workers and supervisors and no crowds.⁷¹ Dr. Veraldi said Plaintiff should be in
2 a low-stress job, so he should not engage in production-type work.⁷²

3 The ALJ assigned great weight to Dr. Veraldi's opinion. Plaintiff, however,
4 argues the ALJ did not capture all of Dr. Veraldi's opined limitations. Plaintiff
5 argues the ALJ did not limit Plaintiff to simple, routine, and repetitive work as
6 Dr. Veraldi opined, did not include Dr. Veraldi's explanation that Plaintiff's
7 depression would fluctuate, and did not include Dr. Veraldi's explanation that
8 Plaintiff would at times have marked impairments. Plaintiff also alleges the ALJ
9 did not account for Dr. Veraldi's testimony that she had not considered Plaintiff's
10 physical pain in her analysis, which Plaintiff says is an additional factor affecting
11 concentration and pace.⁷³

12 "[T]he ALJ is responsible for translating and incorporating clinical findings
13 into a succinct RFC."⁷⁴ Plaintiff is correct that the ALJ limited Plaintiff to simple,
14 routine work, but did not include the word "repetitive" in the RFC. Plaintiff
15 submits the failure to include "repetitive" was error. The ALJ explained his
16 intentional omission of "repetitive" at the hearing, however. In response to the
17 vocational expert's question about whether Plaintiff was limited to unskilled work,
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19 ⁷¹ AR 67.

20 ⁷² AR 68.

21 ⁷³ ECF No. 14 at 11.

22 ⁷⁴ *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015).
23

1 the ALJ said he was aware that Dr. Veraldi said repetitive, but that “it’s more from
2 anxiety, a low stress kind of work rather than any limitations because of
3 intellectual capacity or ability to do skilled work.”⁷⁵ Hence, the ALJ ultimately
4 limited Plaintiff to “simple, routine work (although not necessarily unskilled work)
5 in a low stress job.”⁷⁶ This is a rational incorporation of Dr. Veraldi’s opinion.⁷⁷

6 Plaintiff additionally argues the ALJ’s decision did not properly include
7 Dr. Veraldi’s explanation that Plaintiff’s depression would fluctuate. Dr. Veraldi
8 indeed testified that Plaintiff’s depression “fluctuates as major depressive disorder
9 does.” But Plaintiff does not articulate how this should have changed the RFC
10 crafted by the ALJ, which already restricted Plaintiff to a limited range of
11 sedentary work with additional limits on social interaction, pace, and stress to
12 accommodate Plaintiff’s limitations related to his depression.⁷⁸

13 Plaintiff argues the ALJ did not include Dr. Veraldi’s explanation that
14 Plaintiff would at times have marked impairments. But this is not an accurate
15 representation of Dr. Veraldi’s opinion. Dr. Veraldi did not definitively state that
16 Plaintiff would experience marked limitations. Rather, she stated that, “depending
17 on how much he’s angry and irritable, and how serious his social phobia is,
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19 ⁷⁵ AR 80.

20 ⁷⁶ AR 30.

21 ⁷⁷ *See Rounds*, 807 F.3d at 1006.

22 ⁷⁸ *See* AR 30.

1 obviously that gets him up into marked.”⁷⁹ In other words, Dr. Veraldi was noting
2 the possibility of a marked limitation, not the existence of one. Plaintiff has not
3 pointed to medical evidence establishing that he gets so angry and irritable or that
4 his social phobia is so extensive that he reaches a marked limitation.

5 Finally, Plaintiff argues the ALJ failed to address Dr. Veraldi’s statement
6 that she did not consider Plaintiff’s chronic pain and depression together when
7 making her assessment about Plaintiff’s limitations related to concentration,
8 persistence, and pace. Essentially, Plaintiff argues that, by relying on Dr. Veraldi’s
9 opinion, the ALJ also failed to consider the combined effects of Plaintiff’s chronic
10 pain and depression. Plaintiff says his physical pain is an obvious additional factor
11 that affects his concentration. As a general matter, chronic pain should be factored
12 into an ALJ’s analysis concerning the effects of a mental disorder, as the effects of
13 pain are not always easily separated from the effects of a mental disorder.⁸⁰ That
14 means the effects of chronic pain should be considered in combination with the
15 effects of mental disorders such as depression and anxiety. Here, however, there is
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17 ⁷⁹ AR 64.

18 ⁸⁰ See *Lester*, 81 F.3d at 829-30 (noting that, for claimant with chronic pain
19 syndrome and affective disorder, the consequences of the physical and mental
20 impairments were inextricably linked and the Commissioner “erred as a matter of
21 law in isolating the effects of [the claimant’s] physical impairment from the effects
22 of his mental impairment”).
23

1 no indication the ALJ failed to do so. Rather, and as explained below, the ALJ
 2 discounted Plaintiff's testimony about the intensity, persistence, and limiting effect
 3 of his physical symptoms, including his knee and back pain. Thus, while the ALJ
 4 considered Plaintiff's pain, he did not find it as limiting as alleged. For the reasons
 5 explained below, the ALJ's finding in this regard was supported by substantial
 6 evidence.

7 Plaintiff fails to establish error with respect to the ALJ's consideration of the
 8 medical-opinion evidence.

9 **B. Plaintiff's Symptom Reports: Plaintiff fails to establish**
 10 **consequential error.**

11 Plaintiff argues the ALJ failed to provide valid reasons for rejecting his
 12 symptom reports. When examining a claimant's symptoms, the ALJ utilizes a two-
 13 step inquiry. "First, the ALJ must determine whether there is objective medical
 14 evidence of an underlying impairment which could reasonably be expected to
 15 produce the pain or other symptoms alleged."⁸¹ Second, "[i]f the claimant meets the
 16 first test and there is no evidence of malingering, the ALJ can only reject the
 17 claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific,
 18 clear and convincing reasons' for the rejection."⁸² General findings are insufficient;
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20 ⁸¹ *Molina*, 674 F.3d at 1112.

21 ⁸² *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter*, 504
 22 F.3d at 1036).
 23

1 rather, the ALJ must identify what symptom claims are being discounted and what
2 evidence undermines these claims.⁸³ “The clear and convincing standard is the
3 most demanding required in Social Security cases.”⁸⁴ Therefore, if an ALJ does not
4 articulate specific, clear, and convincing reasons to reject a claimant’s symptoms,
5 the corresponding limitations must be included in the RFC.⁸⁵

6 Factors to be considered in evaluating the intensity, persistence, and
7 limiting effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
8 duration, frequency, and intensity of pain or other symptoms; 3) factors that
9 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
10 side effects of any medication the claimant takes or has taken to alleviate pain or
11 other symptoms; 5) treatment, other than medication, the claimant receives or has
12 received for relief of pain or other symptoms; 6) any non-treatment measures the
13

14 ⁸³ *Id.* (quoting *Lester*, 81 F.3d at 834), and *Thomas v. Barnhart*, 278 F.3d 947, 958
15 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why he discounted
16 claimant’s symptom claims)).

17 ⁸⁴ *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278
18 F.3d 920, 924 (9th Cir. 2002)).

19 ⁸⁵ *Lingenfelter*, 504 F.3d at 1035 (“[T]he ALJ failed to provide clear and convincing
20 reasons for finding Lingenfelter’s alleged pain and symptoms not credible, and
21 therefore was required to include these limitations in his assessment of
22 Lingenfelter’s RFC.”).

1 claimant uses or has used to relieve pain or other symptoms; and 7) any other
2 factors concerning the claimant's functional limitations and restrictions due to pain
3 or other symptoms.⁸⁶ The ALJ is instructed to "consider all of the evidence in an
4 individual's record" to "determine how symptoms limit ability to perform work-
5 related activities."⁸⁷

6 With respect to physical symptoms, Plaintiff testified that he suffered an
7 adolescent knee injury that has since caused him pain. Plaintiff testified that he
8 has had three surgeries to his left knee and one to his right. Plaintiff stated that
9 his legs are stiff and feel as though they are on fire when he wakes up. He also
10 stated he experiences daily pain and swelling in his knees which is made worse by
11 activity and for which he must daily elevate his legs. Plaintiff testified to difficulty
12 walking and said he cannot stand in one place for 60 seconds without pain.
13 Plaintiff stated that he uses ice packs and ibuprofen multiple times per day to treat
14 his pain. Plaintiff also stated that he suffers low back pain for which he uses daily
15 Epsom salts or hot pads. He states his leg and back pain is made worse by sitting,
16 standing, crouching, bending, twisting, and lifting/carrying a weight equal to a
17 gallon of milk and that he cannot do any of these activities on a repeated basis for
18 2-3 hours out of an 8-hour workday. Plaintiff also testified that he is typically in a
19 resting posture with his legs elevated for 75 percent of the day.

21 ⁸⁶ SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. § 416.929(c).

22 ⁸⁷ SSR 16-3p, 2016 WL 1119029, at *2.

1 With respect to mental symptoms, Plaintiff testified to volatile mood swings,
2 being sent into a dangerous rage by trivial events, becoming confrontational with
3 strangers over misperceived slights, intensifying depression and manic phases
4 characterized by grandiose ideas, the inability to be still, and incoherent speech.
5 Plaintiff also testified to inexplicably feeling like he hates his fiancé, poor sleep,
6 and feeling aimless.

7 1. Physical Symptoms

8 Here, the ALJ found Plaintiff's statements concerning the intensity,
9 persistence, and limiting effects of his physical symptoms were inconsistent with
10 his improvement with treatment, the objective medical evidence, and his activities
11 of daily living.⁸⁸

12 a. Improvement with Treatment

13 An ALJ may discount a claimant's reported symptoms if they improved with
14 treatment.⁸⁹ Here, the ALJ said, "the medical evidence of record shows consistent
15 reports of improvements in [Plaintiff's] physical symptoms with treatment such
16 that he is satisfactorily able to perform household responsibilities and activities of
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18 ⁸⁸ AR 32-33.

19 ⁸⁹ The effectiveness of treatment is a relevant factor in determining the severity of
20 a claimant's symptoms. 20 C.F.R. § 416.913(c)(3); *Morgan v. Comm'r of Social Sec.*
21 *Admin.*, 169 F.3d 595, 599–600 (9th Cir. 1999) (considering evidence of
22 improvement).
23

1 daily living.”⁹⁰ The ALJ did not provide further discussion on this point but did cite
2 accurately to many notes in the medical record stating that Plaintiff had reported
3 improvement, was satisfied with his current therapy, and could perform household
4 responsibilities and activities of daily living to his satisfaction.⁹¹

5 The ALJ’s finding that Plaintiff improved with treatment is rational and
6 supported by substantial evidence in the overall record. In addition to the reports
7 of improvement noted by the ALJ, Plaintiff reported doing well on many occasions
8 and noted frequently that his pain was well-controlled.⁹² Sometimes Plaintiff’s pain
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10 ⁹⁰ AR 32.

11 ⁹¹ AR 32.

12 ⁹² AR 415-16 (December 2015 treatment note states, “The patient reports he has
13 had a decrease in pain and has been able to do more activities” and “He states the
14 pain medication is working well” and “patient reports the current regimen is
15 working well to control his pain and even states he feels his pain has decreased”);
16 AR 412 (January 2016 treatment note says “He reports that Oxycodone has been
17 the first pain medication that has worked well for his pain with little to no side
18 effects. He has been working for his cousin driving a tractor. He feels with the
19 oxycodone he can function quite well.”); AR 544 (October 2016 treatment note says
20 “He states that he still has knee pain [after corticosteroid injection] however he is
21 doing alright with his current pain medication” and “James is doing well”); AR 660
22 (February 2017 treatment note says Plaintiff is getting 8 hours of sleep, has good
23

1 worsened, but the overall record reveals that Plaintiff generally responded well to
2 targeted treatment and generally felt good when he was taking his medication as
3 prescribed.⁹³ Notably, Plaintiff in 2017 reported that his pain medication was
4 beneficial and made him functional and the day bearable.⁹⁴ His treatment
5 providers made similar comments. In a September 2017 note, a treating physician
6 wrote that, “He remains stable from a pain/functionality perspective with the
7 current medication regimen.”⁹⁵

8
9 energy, good appetite, he is taking his medications and “they are working” and “he
10 feels like his medications are doing well” and “He feels good about how he is
11 doing.”); AR 729 (June 2017 treatment note states, “James states he is overall
12 doing well”); AR 723 (August 2017 treatment note states “He is doing well on his
13 current regimen therefore I recommend no changes at this time”);

14 ⁹³ See, e.g., AR 435 (July 2015 treatment note states Plaintiff had 80% pain relief
15 after right and left steroid injection; felt so good that he went on numerous walks
16 and hikes, ultimately re-injuring the knee); AR 428 (August 2015 treatment note
17 stating Plaintiff reported improvement in walking, bending, and standing after left
18 and right knee corticosteroid injections); AR 742 (March 2017 treatment note
19 stating Plaintiff had 60% pain relief after right genicular nerve block and had
20 improvement in range of motion, walking, standing, and sitting).

21 ⁹⁴ AR 745.

22 ⁹⁵ AR 720.

1 The ALJ’s finding that Plaintiff improved with treatment is supported by
 2 substantial evidence in the overall record, including the above-cited evidence that
 3 was not expressly discussed by the ALJ.⁹⁶ Plaintiff’s improvement with
 4 treatment—noted by Plaintiff’s treating providers and Plaintiff himself—was a
 5 clear and convincing reason to discount Plaintiff’s testimony regarding his physical
 6 symptoms and their limiting effects.

7 ***b. Objective Medical Evidence***

8 As for the ALJ’s finding that Plaintiff’s symptom reports were inconsistent
 9 with the objective medical evidence, symptom reports cannot be discounted on the
 10 sole ground that they were not fully corroborated by the objective medical
 11 evidence.⁹⁷ However, objective medical evidence is a relevant factor in considering
 12 the severity of the reported symptoms.⁹⁸ Here, the ALJ found that consistent
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14 ⁹⁶ See *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court “must
 15 consider the entire record as a whole, weighing both the evidence that supports and
 16 the evidence that detracts from the Commissioner’s conclusion,” not simply the
 17 evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383,
 18 386 (8th Cir. 1998) (“An ALJ’s failure to cite specific evidence does not indicate that
 19 such evidence was not considered[.]”).

20 ⁹⁷ See *Rollins*, 261 F.3d at 857.

21 ⁹⁸ Objective medical evidence means signs, laboratory findings, or both. 20 C.F.R.
 22 § 416.902(k). In turn, “signs” are defined as:
 23

findings of grossly intact 5/5 strength of the bilateral lower extremities were inconsistent with Plaintiff's claim that he cannot perform even the limited range of sedentary work set forth in the RFC.⁹⁹ The ALJ also noted that Plaintiff "had some findings of normal gait."¹⁰⁰ While the ALJ did not misstate these objective findings, he has taken them out of context. Context is crucial as "treatment records must be viewed in light of the overall diagnostic record."¹⁰¹ An ALJ may not cherry pick evidence to support a conclusion while ignoring other competent evidence in the

one or more anatomical, physiological, or psychological abnormalities that can be observed, apart from [the claimant's] statements (symptoms). Signs must be shown by medically clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena that indicate specific psychological abnormalities, e.g., abnormalities of behavior, mood, thought, memory, orientation, development, or perception, and must also be shown by observable facts that can be medically described and evaluated.

Id. § 416.902(l). Evidence obtained from the "application of a medically acceptable clinical diagnostic technique, such as evidence of reduced joint motion, muscle spasm, sensory deficits, or motor disruption" is considered objective medical evidence. 3 Soc. Sec. Law & Prac. § 36:26, Consideration of objective medical evidence (2019).

⁹⁹ AR 32.

¹⁰⁰ AR 32.

¹⁰¹ *Ghanim*, 763 F.3d at 1164.

1 record.¹⁰² While bilateral strength of the lower extremities is a relevant factor for
 2 the ALJ to consider, so are other factors. For example, Plaintiff's range of motion in
 3 the lower extremities is relevant, but the ALJ did not discuss objective findings
 4 related to range of motion. This matters here because while strength was
 5 consistently noted at 5/5, Plaintiff showed decreased range of motion that waxed
 6 and waned with treatment.¹⁰³ The ALJ should have considered all relevant factors,
 7 not simply those that support a finding of nondisability.

8 The ALJ also noted that Plaintiff had "some findings of normal gait." But
 9 Plaintiff's treatment providers also frequently (more than 15 times) noted that he
 10 presented with an antalgic gait.¹⁰⁴ The ALJ's reliance on "some findings of normal
 11 gait" thus ignores the overall diagnostic record.

14 ¹⁰² *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984) (cleaned up) ("Although
 15 it is within the power of the Secretary to make findings concerning the credibility
 16 of a witness ..., he cannot reach a conclusion first, and then attempt to justify it by
 17 ignoring competent evidence in the record that suggests an opposite result.").

18 ¹⁰³ *See, e.g.*, AR 348 (2015: decreased ROM in right knee); AR 353 (2015: right knee
 19 could not tolerate manual exam for ROM); AR 389 (2016: limited active and passive
 20 ROM); AR 410 (2016: "crepitus noted in the Bilateral knees with decreased ROM");
 21 AR 742 (2017: significantly improved ROM after genicular nerve block).

22 ¹⁰⁴ AR 407, 410, 541, 544, 697, 714, 720, 723, 727, 731, 734, 737, 743, 746, 749, 752.
 23

1 In short, while objective medical evidence is a relevant factor for the ALJ to
2 consider, here, the ALJ selectively focused on some objective findings (strength of
3 the lower extremities) while ignoring other, equally relevant findings (range of
4 motion of the lower extremities). Moreover, the ALJ ignored the overall diagnostic
5 record by ignoring frequent findings of Plaintiff's antalgic gait. Any error in
6 considering this evidence was harmless, however, as the ALJ discounted Plaintiff's
7 physical symptom testimony based on a clear and convincing reason supported by
8 the record, as explained above.¹⁰⁵ Furthermore, while the ALJ overlooked
9 Plaintiff's range of motion and gait limitations in rejecting his symptom testimony,
10 the RFC accounted for these limitations by restricting Plaintiff to standing or
11 walking for only two hours (and providing that he can sit for up to eight hours in
12 an eight-hour workday), prohibiting foot control operations and climbing ladders,
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15 ¹⁰⁵ See *Carmickle*, 533 F.3d at 1162-63; *Molina*, 674 F.3d at 1115 (“[S]everal of our
16 cases have held that an ALJ’s error was harmless where the ALJ provided one or
17 more invalid reasons for disbelieving a claimant’s testimony, but also provided
18 valid reasons that were supported by the record.”); *Batson v. Comm’r of Soc. Sec.*
19 *Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (holding that any error the ALJ
20 committed in asserting one impermissible reason for claimant’s lack of credibility
21 did not negate the validity of the ALJ’s ultimate conclusion that the claimant’s
22 testimony was not credible).
23

1 ropes, or scaffolds, and restricting him to rare crouching with no kneeling or
2 crawling.

3 *c. Activities of Daily Living*

4 If a claimant can spend a substantial part of the day engaged in pursuits
5 involving the performance of exertional or non-exertional functions, the ALJ may
6 find these activities inconsistent with the reported disabling symptoms.¹⁰⁶ The ALJ
7 highlighted that Plaintiff:

- 8 • Could sometimes help with cooking and chores such as laundry
9 and washing dishes.
- 10 • Did not require help with self-care.
- 11 • Could walk his dog.
- 12 • Was told by treatment providers to engage in aerobic exercise.
- 13 • Traveled to Seattle for a rheumatologist appointment in February
14 2017.
- 15 • Went house hunting with his fiancé in March 2017.
- 16 • Purchased a home and thereafter kept busy gathering items for
17 the house and doing house-related work.
- 18 • Watched his niece three days per week for a period of time.
- 19 • Traveled to Seattle and attended an NFL game.
- 20 • Took a trip to the Oregon coast.

21
22 ¹⁰⁶ *Molina*, 674 F.3d at 1113.

1 Importantly, “disability claimants should not be penalized for attempting to
2 lead normal lives in the face of their limitations.”¹⁰⁷ Moreover, “[t]he Social
3 Security Act does not require that claimants be utterly incapacitated to be eligible
4 for benefits, and many home activities may not be easily transferable to a work
5 environment where it might be impossible to rest periodically or take
6 medication.”¹⁰⁸ For these reasons, activities of daily living bear on a claimant’s
7 symptom reports only if the level of activity is inconsistent with the individual’s
8 claimed limitations.¹⁰⁹

9 Here, many of the activities cited by the ALJ are not inconsistent with
10 disability. For example, the ability to occasionally help with cooking and laundry—
11 activities that do not take up a substantial part of the day—is not inconsistent with
12 disability, nor is the fact that Plaintiff did not require assistance to care for
13 himself. Further, it would be inappropriate to penalize Plaintiff for traveling to
14 Seattle to seek medical care for the very problems that cause him pain, especially
15 given the appointment was not a recurring appointment.

16 As for Plaintiff’s engagement in house hunting, gathering house-related
17 items, and watching his niece three days per week, the ALJ was without sufficient
18 information about these activities to determine whether they were inconsistent
19

20 ¹⁰⁷ *Reddick*, 157 F.3d at 722 (citations omitted).

21 ¹⁰⁸ *Smolen*, 80 F.3d at 1287 n.7.

22 ¹⁰⁹ *Reddick*, 157 F.3d at 722.

1 with Plaintiff's claimed limitations. It is improper to make assumptions about what
2 these activities entailed. Rather, it would be appropriate to find these activities are
3 inconsistent with Plaintiff's claimed limitations only if the record so demonstrated.
4 Nothing in the record explains what childcare activities Plaintiff engaged in or
5 what he meant by his statement that he "watched" his niece.¹¹⁰ Likewise, nothing
6 in the record explains what Plaintiff meant by "house hunting" and whether any
7 house hunting took up a substantial portion of Plaintiff's day. Absent this
8 information, the ALJ cannot properly find these activities are inconsistent with
9 Plaintiff's claimed limitations.

10 As for walking his dog, the Ninth Circuit has "repeatedly asserted that the
11 mere fact that a plaintiff has carried on certain daily activities, such as grocery
12 shopping, driving a car, or *limited walking for exercise*, does not in any way detract
13 from h[is] credibility as to h[is] overall disability."¹¹¹ There is no evidence in the
14

15 ¹¹⁰ See *Trevizo v. Berryhill*, 871 F.3d 664, 682 (9th Cir. 2017) (although claimant
16 engaged in child-care activity, nothing in the claimant's records revealed "an
17 adequately specific conflict with her reported limitations.").

18 ¹¹¹ *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (emphasis added)
19 (Ms. Vertigan could grocery shop without assistance, walk approximately an hour
20 in the malls, play cards, swim, watch television, and read, but these activities did
21 not consume a substantial part of her day and so did not detract from her
22 credibility).
23

1 record that Plaintiff walks his dog for a substantial part of the day. Therefore, this
2 activity is not a valid reason to reject Plaintiff's symptom testimony.

3 As for being told by treatment providers to engage in aerobic exercise, this is
4 also not a valid reason to reject Plaintiff's symptom testimony. "A patient may
5 [walk or swim] despite pain for therapeutic reasons, but that does not mean she
6 could concentrate on work despite the pain or could engage in similar activity for a
7 longer period given the pain involved."¹¹²

8 Finally, as for the NFL game in Seattle and the 2017 trip to the Oregon
9 coast, the record contains very few details about these events. The ALJ concluded
10 attendance at the football game showed an intact ability to ambulate in a stadium
11 as Plaintiff had described walking into the stands.¹¹³ The ALJ did not explain the
12 significance of the trip to the Oregon coast. In any case, even if reliance on these
13 events was improper and the ALJ's reliance on activities of daily living was
14 therefore an invalid basis upon which to reject Plaintiff's symptom reports,
15 Plaintiff's improvement with treatment—reported by Plaintiff himself as well as
16 his treating providers—was a specific, clear, and convincing basis upon which to
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21 ¹¹² *Id.* at 1050.

22 ¹¹³ AR 33.

1 find Plaintiff's symptoms were not as limiting as alleged.¹¹⁴ Because the ALJ had a
 2 clear and convincing basis upon which to reject Plaintiff's physical symptom
 3 reports, reliance on additional, invalid grounds constitutes harmless error.¹¹⁵

4 2. Mental Symptoms

5 The ALJ found Plaintiff's statements concerning the intensity, persistence,
 6 and limiting effects of his mental symptoms were inconsistent with his
 7 improvement with treatment, "numerous unremarkable findings" as to his mental
 8 functioning, his activities of daily living, and the opinion of Dr. Veraldi that
 9 Plaintiff's abnormal mental objective findings were often in the context of
 10 significant stressors and that Plaintiff showed an ability to seek appropriate help
 11 when his mental symptoms worsened.¹¹⁶

12 a. Improvement with Treatment

13 The ALJ stated that "a finding of more than a moderate limitation in
 14 [cognitive, social, and adaptive] functional areas during the course of the period at
 15 issue is called into question by some reports of improvements in or stabilization of
 16

17 ¹¹⁴ Notably, even though the ALJ validly discounted Plaintiff's symptom reports, he
 18 still restricted Plaintiff to a limited range of sedentary work with additional
 19 postural limitations.

20 ¹¹⁵ See *Carmickle*, 533 F.3d at 1162-63; *Molina*, 674 F.3d at 1115; *Batson*, 359 F.3d
 21 at 1197 (9th Cir. 2004).

22 ¹¹⁶ AR 32-34.

1 the claimant's mental symptoms with medications."¹¹⁷ The ALJ then cited to a
2 counseling treatment note from May 2016 in which Plaintiff reported that he was
3 doing well, even handling "bad things," and that his medications had been
4 helpful.¹¹⁸ The ALJ offered no further analysis or citation to evidence regarding
5 Plaintiff's improvement with treatment. Nonetheless, the ALJ rationally found
6 that Plaintiff did show improvement with treatment. For example, a counseling
7 treatment note from March 2015 states that Plaintiff's moods were "in a good
8 place" and he reported taking his medications appropriately.¹¹⁹ In a counseling
9 treatment note from October 2016 (a time in which Plaintiff was participating in
10 mental health court), Plaintiff reported that he still had "some" anxiety but he was
11 able to remove himself from the situation and calm down.¹²⁰ The same October
12 2016 treatment note provides that Plaintiff was consistently taking his medication
13 and he felt he could control his anxiety well enough to decrease his medications.¹²¹
14 Similarly, a March 2017 counseling treatment note states that Plaintiff had his
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18 ¹¹⁷ AR 33.

19 ¹¹⁸ AR 379.

20 ¹¹⁹ AR 599.

21 ¹²⁰ AR 670.

22 ¹²¹ AR 670.

1 usual amount of depression but felt it was within control and reported some
2 anxiety but said it was “doing pretty good.”¹²²

3 At other times, Plaintiff reported worsening symptoms. But Plaintiff often
4 expressly connected his symptoms to increasing stressors in his life, and especially
5 mental health court, which, according to treatment notes, he participated in
6 between 2015 and 2018. For example, in a counseling treatment note from
7 September 2015, Plaintiff reported that he felt mental health court was making his
8 anxiety worse.¹²³ A counseling treatment note from September 2016 provides that
9 Plaintiff stated he felt mental health court was dominating his life and he started
10 smoking again as a coping mechanism.¹²⁴ In November 2016, Plaintiff reported
11 that mental health court was very difficult for him and he had anger with the court
12 system. He expressed increased depression and panic attacks.¹²⁵ He also reported
13 that mental health court was very anxiety producing.¹²⁶ Also in November 2016,
14 Plaintiff voluntarily checked himself into the hospital for help with mental health
15 symptoms, and he reported mental health court was a contributing stressor.¹²⁷ A
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17 ¹²² AR 647.

18 ¹²³ AR 377.

19 ¹²⁴ AR 583-84.

20 ¹²⁵ AR 595.

21 ¹²⁶ AR 676.

22 ¹²⁷ AR 608.

1 treatment note from Plaintiff's voluntary inpatient stay provides that, "[Plaintiff]
2 also talked about the court requiring him to be here and if he [k]new it was going
3 to be this stressful he would not have agreed. Also [Plaintiff] feels that the court is
4 discriminating against him because the court does not feel he is disabled and he
5 feels that he is."¹²⁸ In March 2017, Plaintiff said mental health court impacts his
6 self-esteem.¹²⁹ He reported obsessive thoughts and guilt in his relationship.¹³⁰ A
7 counseling treatment note from June 2017 provides that Plaintiff "talked about
8 anxiety related to going to the courthouse, feeling na[u]seous, worrying about the
9 possibility of being thrown in jail again and not being able to do anything about
10 it."¹³¹ In August 2018, a counseling treatment note states that Plaintiff had been
11 feeling very depressed for the past few weeks, but that he was happy to be moving
12 toward the end of mental health court.¹³² Despite Plaintiff's stress related to
13 mental health court, Plaintiff reported at the hearing that he successfully finished
14 the court program.¹³³ The ALJ rationally considered that treatment helped
15 Plaintiff successfully complete mental health court, which was a court-ordered
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17 ¹²⁸ AR 614.

18 ¹²⁹ AR 628.

19 ¹³⁰ AR 628.

20 ¹³¹ AR 651.

21 ¹³² AR 585.

22 ¹³³ AR 58.

1 obligation and for which Plaintiff faced jail time if he did not successfully complete
2 the program.

3 Viewing the overall record, the ALJ's finding that Plaintiff's mental
4 symptoms improved with treatment is supported by substantial evidence. As noted
5 above, Plaintiff indicated on multiple occasions that his anxiety and depression
6 were controlled, and his medications were helping him. While he did often report
7 worsening symptoms, he frequently stated those symptoms were the product of, or
8 were connected to, impermanent life stressors such as mental health court or
9 house-hunting. Furthermore, even while Plaintiff was participating in mental
10 health court, he reported being able to calm himself when he felt anxious. Indeed,
11 during Dr. Barnard's psychological assessment of Plaintiff in 2016 (a time in which
12 Plaintiff was participating in mental health court), Plaintiff said he considered
13 himself "relatively stable" mentally.¹³⁴ In short, Plaintiff's improvement with
14 treatment is well-supported in the record and was therefore a valid basis upon
15 which the ALJ could reject Plaintiff's testimony regarding the intensity,
16 persistence, and limiting effects of his mental symptoms.

17 *b. Unremarkable Objective Findings*

18 The ALJ additionally noted "numerous unremarkable findings as to the
19 claimant's mental functioning in the medical evidence of record."¹³⁵ The ALJ stated
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21 ¹³⁴ AR 371.

22 ¹³⁵ AR 33.

1 that Plaintiff has been noted to present as alert and oriented with appropriate
2 mood and affect, as euthymic with normal speech, behavior and thought content,
3 and with goal-directed and logical thought process.¹³⁶ Again, symptom reports
4 cannot be discounted on the sole ground that they were not fully corroborated by
5 the objective medical evidence.¹³⁷ However, objective medical evidence is a relevant
6 factor in considering the severity of the reported symptoms. Here, however, the
7 above findings noted by the ALJ are of limited utility, as they are primarily
8 nonrelevant normal findings related to cognition and demeanor observed by
9 treatment providers during appointments for *physical* symptoms such as knee
10 pain. Moreover, where the ALJ cited to counseling treatment notes, he focused on
11 Plaintiff's demeanor rather than the substance of his symptomology related to
12 anxiety and depression. For these reasons, the above "unremarkable findings"
13 noted by the ALJ are not relevant to Plaintiff's mental symptom reports.¹³⁸
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17 ¹³⁶ AR 33.

18 ¹³⁷ *See Rollins*, 261 F.3d at 857.

19 ¹³⁸ *Ghanim*, 763 F.3d at 1164 (finding the ALJ erred by rejecting the claimant's
20 symptoms resulting from anxiety, depressive disorder, and PTSD on the basis that
21 claimant performed cognitively well during examination and had a generally
22 pleasant demeanor).
23

1 The ALJ later cited other “unremarkable” findings from a psychological
2 evaluation performed in April 2016 by Dr. Barnard.¹³⁹ While findings from
3 Dr. Barnard’s psychological evaluation are undoubtedly relevant and were
4 appropriately considered by the ALJ when determining whether to discount
5 Plaintiff’s mental symptom reports, those findings cannot serve as the sole reason
6 for discounting Plaintiff’s symptom reports. As discussed above, the ALJ’s finding
7 that Plaintiff’s mental health improved with treatment is supported by substantial
8 evidence and supplements the ALJ’s unremarkable-objective-findings reason.

9 c. Activities of Daily Living

10 The ALJ also relied on Plaintiff’s activities of daily living, finding they
11 connoted “a more intact degree of cognitive, social, and adaptive functioning across
12 the longitudinal period at issue.”¹⁴⁰ The ALJ cited Plaintiff’s ability to do the
13 following activities: watch television for up to an hour at a time and play video
14 games for up to two hours at a time, attend church, go fishing, and read.¹⁴¹ These
15 activities, however, are not inconsistent with Plaintiff’s claims regarding his
16 mental health symptoms. The cited activities are largely solitary, requiring limited,
17 if any, social interaction, and permit Plaintiff to participate or engage at his
18 leisure. The activities do not require extended concentration nor is there evidence
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20 ¹³⁹ AR 33-34.

21 ¹⁴⁰ AR 33.

22 ¹⁴¹ AR 33.

1 that they take up a substantial part of Plaintiff's day. For these reasons, the ALJ's
2 finding that these activities are inconsistent with Plaintiff's symptom reports is not
3 a rational finding supported by substantial evidence.

4 While not exactly an "activity of daily living," the ALJ also noted that
5 Plaintiff was able to complete mental health court despite its stressful character.¹⁴²
6 The ALJ properly considered completion of mental health court as indicative of
7 Plaintiff's adaptive functioning capabilities in the face of significant stress.

8 *d. Medical Opinions*

9 An ALJ may consider whether the claimant's symptoms are supported by
10 the medical opinions.¹⁴³ Here, the ALJ considered and gave great weight to the
11 opinion of Dr. Veraldi, who noted that Plaintiff's abnormal objective mental
12 findings and increased symptomology were often in the context of significant
13 stressors such as mental health court. The ALJ also considered Dr. Veraldi's
14 testimony that Plaintiff showed an ability to recognize when he is experiencing
15 increased mental symptomology and seek appropriate help. Dr. Veraldi also noted
16 that nothing in the record documented a manic episode. The ALJ properly
17 considered Dr. Veraldi's opinion when evaluating Plaintiff's symptom reports.

18 *3. Harmless Error*

19 In summary, the ALJ erred in the following ways:

21 ¹⁴² AR 34.

22 ¹⁴³ *Batson*, 359 F.3d at 1196.

- By selectively citing evidence of the Plaintiff's lower extremity strength but ignoring other competent evidence in the overall record.
- By relying on Plaintiff's activities of daily living that are not inconsistent with Plaintiff's claimed physical or mental limitations.
- By relying on nonrelevant normal findings from physical treatment appointments to reject mental symptom testimony.

These errors are harmless, however, because the ALJ offered other clear and convincing reasons supported by substantial evidence for discounting Plaintiff's symptoms.¹⁴⁴ The ALJ's findings—that Plaintiff's physical and mental symptoms and abilities improved with treatment and that Plaintiff's mental health symptoms were inconsistent with Dr. Barnard's unremarkable objective findings, Dr. Veraldi's opinion, and Plaintiff's completion of mental health court—are supported by substantial evidence and demonstrate that the ALJ's errors were inconsequential to his nondisability determination.

C. RFC & Step Five: Plaintiff fails to establish error.

Plaintiff argues the ALJ failed to properly include all of his limitations into the RFC and, consequently, into the hypothetical presented to the vocational expert.

¹⁴⁴ See *Carmickle*, 533 F.3d at 1162-63; *Molina*, 674 F.3d at 1115; *Batson*, 359 F.3d at 1197 (9th Cir. 2004).

1 “[T]he ALJ is responsible for translating and incorporating clinical findings
2 into a succinct RFC.”¹⁴⁵ A mere diagnosis of an impairment, however, does not
3 establish functional deficits.¹⁴⁶ Plaintiff’s argument merely restates his earlier
4 allegations of error, which are not supported by the record. The RFC properly
5 accounted for the functional limitations supported by the record.¹⁴⁷

6 At step five, the ALJ has the burden to identify specific jobs existing in
7 substantial numbers in the national economy that claimant can perform despite
8 their identified limitations.¹⁴⁸ At an administrative hearing, an ALJ may solicit
9 vocational expert testimony as to the availability of jobs in the national economy.¹⁴⁹
10 A vocational expert’s testimony may constitute substantial evidence of the number
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16 ¹⁴⁵ *Rounds*, 807 F.3d at 1006.

17 ¹⁴⁶ *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

18 ¹⁴⁷ *See Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989) (allowing ALJ to
19 restrict hypothetical to those limitations supported by substantial evidence).

20 ¹⁴⁸ *Johnson v. Shalala*, 50 F.3d 1428, 1432 (9th Cir. 1995). *See* 20 C.F.R.
21 § 416.920(g).

22 ¹⁴⁹ *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 2011).
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1 of jobs that exist in the national economy.¹⁵⁰ The ALJ's decision regarding the
2 number of alternative occupations must be supported by substantial evidence.¹⁵¹

3 Here, Plaintiff says the ALJ set forth a hypothetical to the vocational expert
4 that included issues of absenteeism and loss of production that the ALJ did not
5 ultimately adopt as applicable to Plaintiff. Plaintiff submits this is error. However,
6 an ALJ may—and often does—ask a range of hypotheticals to a vocational expert.
7 Plaintiff cites no authority, and this Court is aware of none, that considering a
8 hypothetical necessitates an ultimate finding on the relevant issue. Here, based on
9 the hypothetical consistent with the RFC ultimately crafted by the ALJ, the
10 vocational expert testified that there were available jobs in the national economy.
11 The ALJ's RFC and step-five analysis is rational and supported by substantial
12 evidence.

13 V. Conclusion

14 Accordingly, **IT IS HEREBY ORDERED:**

- 15 1. The case caption is to be **AMENDED** consistent with footnote 2.
- 16 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.
- 17 3. The Commissioner's Motion for Summary Judgment, **ECF No. 17**, is
18 **GRANTED**.

20 ¹⁵⁰ *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).

21 ¹⁵¹ *Farias v. Colvin*, 519 F. App'x 439, 440 (9th Cir. 2013) (unpublished). *See Hill*,
22 698 F.3d at 1158.

1 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

2 5. The case shall be **CLOSED**.

3 **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order and
4 provide copies to all counsel.

5 **DATED** this 30th day of August 2021.

6
7 s/Edward F. Shea
8 EDWARD F. SHEA
9 Senior United States District Judge
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